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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., ET AL., PETITIONERS

v.

THE KROGER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of March 10, 1969, to the Solicitor General to express the views of the United States on this case.

STATEMENT

Petitioners, three dairy companies, filed this action under Section 2 of the Sherman Act seeking permanently to enjoin respondent, The Kroger Company ("Kroger"), from entering the milk processing business in a 250-mile radius around St. Louis, Missouri, and from unlawfully attempting to monopolize the sale of dairy products (R. 8). The district court dismissed the complaint for failure to state a claim upon

which relief can be granted (Pet. App. A–1), and the court of appeals affirmed (Pet. App. A–8).[1]

The complaint. The allegations of the complaint may be summarized as follows. The product market is the processing and sale at wholesale and retail of fluid milk and dairy products. The geographic market is the St. Louis, Missouri trade territory, defined as "the geographical area within 250 miles, more or less, from St. Louis, Missouri" (R. 2) (hereinafter "Territory"). Petitioners are Missouri dairies operating in these markets. They sued on behalf of themselves and as representatives of a class consisting of at least 67 similarly situated dairy companies located in the Territory, including National Dairy Company, The Borden Company, Foremost Dairies, and Beatrice Foods (R. 2, 8–10).

The defendant Kroger is a retail grocery chain; it manufactures, processes, distributes and sells at retail a broad line of merchandise, including fluid milk and other dairy products (R. 3). It operates about 1,500 retail grocery stores in 30 states, about 200 of which are in the Territory. Kroger sells approximately eight percent of the processed fluid milk and other dairy products sold in the Territory (R. 3).

For more than a year prior to the filing of the complaint, Kroger has been and is knowingly and deliberately attempting, with specific intent, to monopolize trade in fluid milk and dairy products.

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[1] The opinion of the district court is reported at 274 F. Supp. 966; the opinion of the court of appeals is reported at 402 F. 2d 968.

On or about February 15, 1967, Kroger began construction of a dairy processing plant in Hazelwood, St. Louis County, with capacity to supply more than 20 percent of the total consumer demand for fluid milk and other dairy products in the Territory (R. 4). Kroger intends not only to supply the full needs of its own stores in the Territory but also to sell dairy products at wholesale there (R. 4–5).

Kroger's operation of 200 stores in the Territory and its present eight percent of the retail dairy market give it power to reduce dairy prices, limited only by the willingness of processors to sell to it and regulatory limitations on pricing (R. 4). If the processing plant is completed, Kroger will be free from these limitations and will have power over prices and power to exclude competition (R. 5).

Kroger sells many product lines and, by means of increased volume and profit margins on other products, it can and does use dairy products as "leaders" and "loss leaders" to attract customers into its stores. The new plant will enable it to increase its use of dairy products for this purpose (R. 5). Kroger has the power to "reap the benefit of depressed milk and dairy products prices by means of increased volume and profit margins" on other grocery products sold to customers attracted by dairy loss leaders (R. 5–6). It can thus "immediately reap the benefit of its power to control the downward price of milk and other dairy products" and thus establish "monopoly power over these products * * * without the usual need to increase its share of * * * [the market] to such a

large percentage that it could then raise the prices of these products * * * " (R. 6).

Kroger "will have completed the acquisition of monopoly power over * * * milk and other dairy products in the * * * Territory if it is allowed to complete the construction" of its new processing plant (R. 6). Kroger's acquisition of such power, and attempt to acquire it by starting to construct the processing plant with specific intent to complete it and acquire monopoly power, violate Section 2 of the Sherman Act (R. 6).

It is further alleged that the violation will have numerous effects. Because it controls eight percent of the established market, its attempt to monopolize gives Kroger an unfair competitive advantage. This attempt also threatens to eliminate and destroy petitioners and other dairies, and seriously to weaken the survivors; will contribute to the concentration of the existing dairy industry and to the transfer of dairy processing to the food chain industry; will destroy local industry; will deprive the public of healthy competition and will compel the public ultimately to pay monopolistic prices for dairy products and other food items. (R. 7.)

The decisions below. The district court held that "the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 * * *" (Pet. App. A–6). The court of appeals unanimously agreed. In its view, "[t]he gist of the complaint is that the building of the plant with the specific intent to monopolize constitutes a proscribed attempt to monopolize under Section 2" (Pet. App.

A–10). Although noting that a motion to dismiss and even a summary judgment proceeding "do not generally afford a satisfactory vehicle for disposing of complex issues" (Pet. App. A–13), it concluded that, stripped of conclusions, unreasonable inferences and unwarranted deductions of fact, the well-pleaded allegations of the complaint failed to state a claim (Pet. App. A–14 to A–15). It held that Kroger's acquisition, through internal expansion, of a 20 percent market share, even if successful, would not constitute a dangerous probability of monopolization (Pet. App. A–16 to A–18). It noted that there was no charge that Kroger could raise milk prices; Kroger's alleged power to lower them by using milk as a "loss leader" and to recover such losses from higher prices on other grocery products appeared to the court to be speculative, since Kroger concededly has no monopoly in the retail grocery field and must operate within the limitations of laws which prohibit predatory trade practices (Pet. App. A–16 to A–19).

Moreover, the court ruled that Kroger's specific intent to monopolize must be shown by conduct or acts from which such an intent can be inferred and that none is alleged. In the court's view the complaint charges, at most, that Kroger would have the power to engage in unfair or predatory practices which would be unlawful. It noted that growth by internal expansion is generally preferable to growth by acquisition, and observed that the only case condemning internal expansion[2] involved a market in which, un-

[2] *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (C.A. 2).

like the dairy industry, a firm with a 90 percent market share kept enlarging its capacity so as to foreclose competition. (Pet. App. A–19 to A–20.)

The court concluded that while there are cases in which market dominance or monopoly is not a prerequisite to establish a violation of Section 2, they all involve acts which, even if otherwise lawful, unreasonably restrain trade. It found that here, however, the only conduct challenged is the building of the dairy facilities, which is not itself unfair or predatory. The court found the claim that the plant would give Kroger a strategic advantage to be speculative and not warranted on the facts alleged (Pet. App. A–22).

ARGUMENT

1. Under the Federal Rules of Civil Procedure, a complaint cannot be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley* v. *Gibson,* 355 U.S. 41, 45–46. This principle applies no less to private antitrust litigation than to any other litigation. *Radovich* v. *National Football League,* 352 U.S. 445, 453. Indeed, this approach is essential to insure the effectiveness of private actions as a means of enforcing the antitrust laws (cf. *Perma Life Mufflers* v. *International Parts Corp.* 392 U.S. 134, 138–139). For, as the Court has noted, in complex antitrust ligitation, motive and intent are often crucial elements to showing a violation; such elements usually can be proved only in a full trial. *Poller* v. *Columbia Broadcasting*

System, 368 U.S. 464, 473; *Fortner Enterprises* v. *U.S. Steel,* No. 306, this Term, decided April 7, 1969.

Rule 8(a)(2) requires only that the complaint contain "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson, supra,* 355 U.S. at 47. Where, as here, the charge is attempt to monopolize—one element of which is a specific motive or intent (see points 2, 4, 5, *infra*)—the complaint need not set forth detailed facts to show such purpose.

2. In the court of appeals' view, the well-pleaded facts of the complaint could be summarized as showing (Pet. App. A–14 to A–15):

> [that] Kroger is a large national chain possessing great assets and presently controlling 8 per cent of the market in question, that it intends to (and did)* build a processing plant for milk and dairy products capable of supplying 20 per cent of that market which includes its captive market of 8 per cent, that it uses milk as a "loss leader", that existing processors have a capacity to and are effectively serving the needs of the territory, present and future, that the dairy facility will endow Kroger with the power to lower prices but not to raise prices, that it may attract

* While plaintiffs sought an injunction to enjoin Kroger from building the dairy facility they did not ask for a restraining order nor post a bond for a preliminary injunction. Now, that which they sought to enjoin having already been built, plaintiffs admit that their prayer should be changed to a request that Kroger be not allowed to attempt to monopolize the milk business. [Footnote by the court.]

> customers by the use of milk as a "loss leader" and sell to these customers other items at higher prices, and that plaintiffs would be adversely affected by the entry of Kroger in the wholesale dairy market.

Because it concluded that petitioners had failed to plead any acts or conduct which would show the requisite intent, the court omitted from this summary petitioners' allegation that Kroger was building its plant with the specific intent to acquire monopoly power in the market for dairy products in the Territory (Pet. App. A–18 to A–19). As noted above, however, petitioners' allegation (R. 6) of that specific intent must be deemed sufficient for purpose of the motion to dismiss.

3. We believe, first, that the facts alleged in the complaint do not tend to show that the construction of Kroger's plant will in itself give Kroger monopoly power in the sale of dairy products in the St. Louis area, and that its legal conclusions in this respect (R. 5) must, therefore, be disregarded. The complaint's factual allegations, relevant to this issue, are merely that Kroger is vertically integrating by building its own milk processing plant, that it controls eight percent of the retail shelf space from which milk and dairy products are sold, and that it has an intent in building its plant to achieve a position from which it can subsequently engage in conduct amounting to an attempt to monopolize.

Even if its plant operated at full capacity, Kroger could at most acquire a market share of no more than 20 per cent, and petitioners do not claim that this

share would give Kroger power to raise prices (R. 6); it would have "power" only to lower them.[3] Moreover, it seems clear from the allegations that the only portion of the market from which Kroger can exclude its competitors in the milk processing business is the eight per cent of the market which represents its own maximum requirements. As to the other 12 per cent which would make up the processing plant's capacity, Kroger's competitive position is similar to that of any other milk processor in the territory, and it is subject to the same regulatory limitations on pricing as other processors.[4] Indeed, Kroger would presumably be at a competitive disadvantage in trying to sell milk to its retail competitors. Thus, there are no facts alleged that support petitioners' conclusion that construction of the plant together with Kroger's control over eight per cent of the retail market for dairy products in the market will give it power over prices or power to exclude and control competition in dairy products (R. 5).

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[3] Power to lower, but not to raise, prices does not constitute control over price within the meaning of the monopolization cases. Obviously any seller has this power. While its exercise may in some circumstances, such as sales below cost, violate the law (*United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29), its existence is not in itself evidence of monopoly power, which normally refers to the ability of sellers to raise prices at will. *American Tobacco Co.* v. *United States*, *supra*, 328 U.S. at 811; *Fortner* v. *U.S. Steel*, *supra*, Slip Op. at p. 8.

[4] 21 Missouri Stat. (1968 Cumul. Pocket Part) 416.415 prohibits milk processors or distributors from selling any milk product, at wholesale or retail, below cost "with the intent or * * * effect of unfairly diverting trade from [or otherwise injuring] a competitor, * * * or of destroying competition, or of creating a monopoly * * *."

4. It follows that the complaint was properly dismissed if, as Kroger argues, a plaintiff, in order to establish an attempt to monopolize within the meaning of Section 2, must allege and prove a reasonable likelihood that the challenged conduct, if accomplished, would result in the monopolization of a relevant economic market (see *Swift and Company* v. *United States,* 196 U.S. 375, 402). We do not believe, however, that the "attempt to monopolize" provision of that Section is limited to a common-law "attempt" relationship with that Section's monopolization offense. Attempt to monopolize is a separate and distinct offense which should be defined in the light of Congress' purpose in the Sherman Act to reach all unreasonable restraints of trade (*Standard Oil Co.* v. *United States,* 221 U.S. 1, 61):

> the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.

Attempt to monopolize, therefore, is not limited to acts which, while falling short of monopolization, create a dangerous probability that it will be attained (*American Tobacco Co.* v. *United States,* 328 U.S. 781, 785, 815; *United States* v. *Aluminum Co., supra,* 148 F. 2d at 431). It also reaches acts by one competitor that exclude another from the market, when

the acts in themselves are so predatory, unfair, or clearly without legitimate business purpose as to be patently unreasonable restraints. *Lessig* v. *Tidewater Oil Company,* 327 F. 2d 459, 474–475 (C.A. 9), certiorari denied, 377 U.S. 993; see *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 222–226; *United States* v. *duPont & Co.,* 351 U.S. 377, 395–396, n. 23; *United States* v. *National City Lines,* 186 F. 2d 562 (C.A. 7), certiorari denied, 341 U.S. 916; Rahl, *Conspiracy and the Antitrust Laws,* 44 Nw. U. L. Rev. 743 (1950); Turner, *Antitrust Policy and the Cellophane Case,* 70 Harv. L. Rev. 281 (1956).[5] Accordingly, "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Lessig* v. *Tidewater Oil Company, supra,* at 474. It is "not in issue" because it is unnecessary to determine whether, if the attempt succeeded, monopolization would result; and the relevant market need be defined only to ascertain whether monopoly power itself exists.

We recognize that this Court expressed a seemingly contrary view of the "attempt to monopolize" provision in *Walker Process Equipment, Inc.* v. *Food Machinery Corp.,* 382 U.S. 172, 177–178. We do not believe the issue is foreclosed by that decision, however, since only monopolization, and not attempt to monopolize, was alleged in the complaint in that case, and neither in the briefs nor in the oral argument was there any effort to deal with the proper con-

[5] But see *United States* v. *Chas. Pfizer & Co.,* 245 F. Supp. 737 (E.D.N.Y.); *United States* v. *Johns-Manville Corp.,* 231 F. Supp. 690 (E.D. Pa.).

struction of the "attempt to monopolize" provision.[6]

5. It is, therefore, our view that the petitioners would be entitled to relief under Section 2 if they proved, in addition to the elements explicitly alleged in the complaint (see point 2, *supra*), that Kroger (1) specifically intends regularly to sell below cost the milk produced in its plant for the purpose of injuring other dairy processors, or to engage in other unreasonable exclusionary practices, and (2) has performed an overt act to implement that intention. Similarly, we believe it would be an unlawful attempt to monopolize if Kroger were to engage in such practices, or if it actually used its profits from the retail grocery business to subsidize persistent below-cost sales aimed at eliminating other dairy processors.

On the other hand, in the absence of proof of such exclusionary practices, or of an implemented specific intent to engage in them, we believe that this lawsuit would constitute merely an unmeritorious effort by the petitioners to exclude Kroger from legitimately competing with them. Internal vertical expansion by a firm that is not a monopolist is not in itself an unfair or predatory business practice. Rather, as the court of appeals recognized (Pet. App. A–20), entry by internal growth into new markets is the preferred method of industrial expansion under the economic policies expressed in the antitrust laws. Such expansion can

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[6] Similarly, we believe that this Court's explicit approval of the instructions to the jury in *American Tobacco Co.*, *supra*, 328 U.S. at 785, 815, must be read in light of the fact that the Court was there rejecting the petitioners' attack on the instructions and was not presented with any issue as to whether the instructions erred in favor of the petitioners.

enhance competitive performance and can result in reduced costs and lower prices to consumers.

The fact that Kroger may achieve economies through vertical expansion and may thereby be enabled to reduce milk prices does not, without more, evidence an attempt to monopolize. Nor is predatory intent shown by the fact that Kroger, by building a plant with capacity in excess of its current maximum retail requirements, is able to compete with petitioners in selling to other retail outlets. To hold otherwise might well inhibit firms from seeking to increase competition by entering new markets. Indeed, even if an unlawful attempt to monopolize were to be proved, by a requisite showing of specific intent, in a case such as the present one, we question whether it would be an appropriate remedy to enjoin the defendant unconditionally from entering the market.

6. Because the complaint alleges only a specific intent to attain a market position—which, as shown above, does not approach monopoly power—and does not allege any specific intent to engage in exclusionary conduct amounting to an attempt to monopolize, it is not clear to us that the petitioners are prepared to undertake the burden of proof we believe is necessary in order to substantiate their charge of an attempt to monopolize in violation of Section 2.[7] Although it may be too stringent under modern concepts of federal pleading to require more specific allegations in the complaint (cf. *Walker Process, supra,* 382 U.S. at 178), we believe that lawsuits seeking to stifle the

[7] We note also that petitioners have not sought to amend their complaint (R. 21).

entry of new competitors into a market should not lightly be encouraged. There is a danger that such suits can become the instrument of unwarranted exclusionary tactics by plaintiffs who wish to entrench their own competitive position. We submit, therefore, that certiorari should be denied in this case unless, in response to this memorandum, the petitioners indicate that they are willing to undertake the burden of proving the elements of a violation of Section 2 set forth in this memorandum (see point 5, *supra*).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied, unless the petitioners indicate to this Court that they are willing to undertake to prove an "attempt to monopolize" as defined in this memorandum, in which event the petition should be granted.

Respectfully submitted.

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